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No. 225

BRIEF OF RESPONDENT

IN THE

Supreme Court of the United States

October Term, 1947.

BAKERY SALES DRIVERS LOCAL UNION NO. 33,
An Unincorporated Association, and
CHARLES M. ANDRE, *Petitioners*,

v.

A. WAGSHAL, Trading as "Wagshal's Delicatessen,"
Respondent.

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BRIEF OF RESPONDENT

QUESTION PRESENTED

Contrary to petitioners' statement in their "Statement of the Case", "Specification of Errors" and "Summary of Argument", the present Petition does not bring up for review the validity of the Trial Court's Order of Septem-

ber 7, 1945, denying Petitioners' Motion to Dismiss the Complaint. (R. 15) This is for the reason that the only basis for petitioners' appeal to the Court below is their claim to an appeal as of right under Section 10 of the Norris-LaGuardia Act (29 U. S. C. A. Section 110). But that section is limited to appeals from Orders granting or denying a temporary injunction in a case involving or growing out of a labor dispute, and does not include other interlocutory orders.

As appeals from the District Court to the Court below are limited to final judgments (Title 17-101, D. C. Code, 1940; *Toomey v. Toomey*, 149 F. (2) 19, 80 U. S. App. D. C. 77), in the absence of a special appeal from an interlocutory order (which was denied (R. 16) by the Court below) the only question for review by this Court is the validity of the Order granting a temporary injunction.[1] This Order has been in force since September 10, 1945—over two years. Under the Rules the case is entitled to be advanced for hearing but it is noticeable petitioners have made no effort to obtain a hearing and thus develop the full facts.

The sole question presented is therefore whether the trial Court had power to grant the Temporary Injunction without complying with the special requirements of the Norris-LaGuardia Act and this question reduces itself to

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[1] Respondents filed a motion below to dismiss the appeal on the ground (a) the order overruling the Motion to Dismiss the Complaint was palpably non-final and hence non-appealable and (b) the order granting the temporary injunction was non-appealable, the Norris-LaGuardia Act being unapplicable. (R. 16) The Court below stated that "technically this cause is before us on an appeal from an Order of the District Court overruling appellant's motion to dismiss and an Order of the District Court granting an injunction pendente lite." (R. 19) However, the Court limited its opinion to whether the case involved a "labor dispute" within the meaning of the Norris-LaGuardia Act which question is pertinent solely to the matter of an appeal as of right from an Order granting a temporary injunction. (See LaGuardia Act, 29 U. S. C. A. 110) The Norris-LaGuardia Act gives no right of appeal from other interlocutory Orders such as an Order denying a Motion to Dismiss the Complaint.

whether the case involved a "labor dispute" within the meaning of that Act. (See Opinion below, R. 19)

Moribund Nature of Present Litigation:

The Yale Law School adopted the present case for academic discussion this year in its Moot Court. We suggest the case is of similar academic interest in this Court. The following facts appear:

(a) Hinkle's Bakery, the employer in the present case, went out of the wholesale business April 15, 1946. (See Appendix A)

(b) Union bakeries represented by petitioners'. Union are now delivering bread to respondent and have been since May 1947. (See Affidavit of Benjamin Wagshal, Appendix A.)

(c) The New Philadelphia Bakery, unionized, and New Yorker Bakery is paid by check in accordance with Respondent's practice at the time of the present dispute. In the case of the Continental Bakery, unionized, Respondent pays the driver. (See Appendix A)

(d) The Temporary Injunction was granted September 7, 1945, over two years ago.

(e) Petitioners' Special Appeal, General Appeal and Petition for Certiorari have delayed the trial on the merits from that date to this.

(f) The case is No. 1 on the Trial Calendar of the United States District Court for the District of Columbia, awaiting trial.

(g) Section 8 (b) (4) (A) of the Taft-Hartley Act (Public 101, 80th Congress) renders illegal the activities which the Injunction herein prohibits. It cannot be assumed the N. L. R. B. would not consider a complaint and move to restrain any resumption of the Union's illegal acts.

Only the injunction is involved on the present appeal. The above shows that no dispute now exists between the union and Respondent relative to (a) the time of delivery of bakery products; (b) method or practice of making collections for deliveries or (c) the sale of nonunion made items (see petitioner's brief page 3).

The mootness of the appeal from the injunction is shown by the fact that the employer is out of business and that members of petitioner's union are now making deliveries to Respondent. The injunction (R. 14) does not require; indeed, could not require this due to the 13th Amendment (See *U. S. v. Petrillo,* this Court, No. 954, of 1946, Appellees brief, point 3); cf. *Retail Food Clerks v. Union Premier Stores,* 308 U. S. 526).

OUTLINE OF ARGUMENT

Bearing in mind the present appeal involves only the injunction, the voluntary resumption of deliveries by the Union destroys any actual controversy, and makes the case moot.

But if not, the matter of hours of delivery was not a labor dispute. As the hour of delivery was inconvenient to the particular driver involved, the respondent ceased dealing with that particular bakery and took his trade to other Union bakeries, which now, using Union drivers, serve respondent. (Appendix A).

As to petitioners' second labor dispute (Pet. Brief p. 3, 9), the Union simply volunteered to collect by force a debt of $12.22 owed the employer, a matter which the Court below said should have been made the subject of a suit in the Small Claims Court. (R. 24) The claim that the money was owed the driver and not the bakery was obviously made to support the Union's demand for the money. (See R. 8, 9) Petitioners' counsel puff this up into a Union demand to change the method of doing business.

This, however, is simply argument of counsel. (Pet. Brief p. 9) The record contains no foundation for it. The only record references to it are at R. 2-3 and 9-10. What opposing counsel might, could, would or should have shown below, his various proffers of proof made to this Court in Petitioners' brief p. 8-9, are beside the point. But, once more, the Union is now serving Respondent; sometimes the driver collects and sometimes the Respondent pays direct. (Ex. A)

The third alleged labor dispute (Pet. brief p. 3, 10) offering for sale an alleged non-union product, resulted in its discontinuance. (R. 10) Also, the uncontradicted record shows that the Union agents order to respondent to get rid of the non-union item was made simply to enforce his demand for payment of the money. (R. 10)

The Court below did not, as petitioners contend, undertake to determine between a good labor dispute and a bad labor dispute; it simply held there was no labor dispute involved at all within the meaning of the LaGuardia Act. The Court had power to do this on the Complaint and Affidavits; it was an initial jurisdictional determination upon a Motion for Injunction to preserve the *status quo*. As in *U. S. v. United Mine Workers*, 91 L. Ed. 595, it was subject to change when the full facts were developed by Motion to Vacate, which Petitioners did not file, or by a hearing on the merits which Petitioners made no effort to obtain.

STATEMENT OF THE CASE

How Case Arose:

It is important to bear in mind that the present case was decided in the District Court on the basis of (a) The Complaint (R. 1); (b) Respondent's Motion for an In-

junction (R. 5); (c) Petitioner's Motion to Dismiss the Complaint on the ground the Norris-LaGuardia Act applied (R. 5, 6); Respondent's Answer to Petitioners' Motion to Dismiss, which Answer alleged that no "labor dispute" within the meaning of the Act was involved (R. 7); (d) Respondent's Affidavits supporting her Motion for a Temporary Injunction. The decision below arose on Respondent's Motion to Dismiss the appeal. (R. 16, 19)

Petitioners' Motion to dismiss filed in the District Court admits all facts well pleaded, no Answer having been filed. Also, as Petitioners filed no counter-affidavits the facts shown in Respondent's Affidavits must be taken to be true. They are in fact true. It is important to bear these facts in mind as Petitioners, on page 9 of its brief, proffer alleged facts and surmises outside the present Record which Petitioners could have but did not present to the Trial Court.

THE FACTS:

Petitioners having filed a Motion to Dismiss and adopted the sole and exclusive position in the Court below that the cause involved a "labor dispute," *the following facts were admitted to be true:*

Respondent has been for many years the owner of a delicatessen business located at 4855 Massachusetts Avenue, Northwest, Washington, District of Columbia. She sells at retail hundreds of kinds of foods, most of which are prepared and packaged by manufacturers throughout the United States and abroad. Among the foods sold are large quantities of bread, rolls, pastries and other bakery products "which are absolutely essential to the conduct of plaintiff's business." Shortly after filing the complaint in the Court Below, she had spent about $10,000 for modernization,

equipment and alterations in her store. The gross sales derived from the business totaled about $100,000 a year. R. 1)

On May 5, 1945, a bakery truck dr er, member of petitioners' Union, commenced delivering bakery products for Hinkle's Bakery. Respondent had been doing business with Hinkle's Bakery for several years prior thereto. On several occasions prior to July 5, 1945, the bakery truck driver had delivered bakery products to respondent during the busy noon hour and, accordingly, on July 5, 1945, Respondent required the said driver to bring said products back at a later hour. (R. 2) Shortly thereafter, Hinkle's Bakery advised Respondent that the driver would make no further deliveries to Respondent and that, therefore, Hinkle's bakery would not furnish Respondent with any more bakery products. Thereupon, Respondent arranged with another bakery (New Philadelphia) to secure bakery products and deliveries were made.

On July 26, 1945, the Petitioner, Charles M. Andre, appeared at Respondent's place of business, identified himself as the agent of the Union, and stated that $150 was owing to the bakery truck driver aforesaid by Respondent. He demanded immediate payment. Respondent stated that she had had no dealings with the driver and that the account was with Hinkle's Bakery; that previous payments had always been made directly to the Bakery by check and never to the driver; that Hinkle's would be paid in due course. Andre stated that payment would have to be made directly to the driver in full, and, further, that unless Respondent immediately discontinued selling a certain non-union made item, the Union would forthwith stop deliveries to Respondent of bread, bakery and dairy products, and other shipments from without the District of Columbia made by Railway Express. Andre stated that his Union was formed and maintained to enforce its de-

mands and were able to do so. Shortly thereafter payment of the account was made by Respondent as in the past, to Hinkle's Bakery, less certain credits. The payment was returned *by the Union,* with a letter signed by Andre, as president, stating that the payment "which is owed to our member, Leon Wolfe, cannot be accepted." (R. 2)

On July 27, 1945, the New Philadelphia Bakery which had been delivering products to respondent, sent word that no more deliveries could be made; that the Union had threatened to "pull out all its drivers if any products were sold or delivered to appellee." Thereupon, Respondent attempted to secure products from other bakeries and the Union threatened similar reprisals if products were sold or delivered to Respondent. A boycott was accordingly laid against Respondent. Respondent was not able to buy bread from bakeries. The Union also threatened to prohibit all deliveries and sales of milk and other dairy products. Respondent was not able to purchase bread at retail, retail stores having been threatened with reprisals if sales were made to Respondent. The union announced to various bakeries that "plaintiff was involved in a labor dispute," which statement was alleged to be false.

Respondent had, prior to the incidents herein recited, enjoyed a good reputation in the trade, yet Andre published false and malicious statements that Respondent owed money to the Hinkle Bakery truck driver and would not pay him. (R. 3)

Andre personally stood outside of Respondent's place of business and picketed the delicatessen. The picketing and boycotting herein described *continued* and as a result Respondent was unable to secure necessary food products, all of which illegal conduct would ultimately destroy Respondent's business.

Accordingly, the Court below was asked to restrain pendente lite and permanently the Petitioners from boy-

cotting and interfering with the business of Respondent, and, further, restrain Petitioners from publishing false statements with respect to Respondent's business. In addition to the injunctive relief, Respondent claimed actual damages in the amount of $50,000 and an equal amount as punitive damages. (R. 4)

We also set forth herewith a digest of the uncontroverted affidavits filed in support of the application for interlocutory relief:

Benjamin Wagshal

This affiant stated that the delicatessen had been operating for approximately nine years and in its present location approximately seven years; that he is the manager thereof; that it is a general delicatessen business and restaurant; that the business is retail in nature; that food is also served on the premises; that bread is an essential product in the conduct of the business; that business had been done with Hinkle's Bakery for approximately three years; that purchases of bread had been made directly from Hinkle's Bakery and payment therefor always made by check to Hinkle. (R. 8) that at no time theretofore had any question ever been raised by the Union or any of its drivers in regard to the direct payment to Hinkle for products purchased; that no demand for payment had ever been made at any time by the Union or any driver thereof prior to the instant controversy; that no contractual relations with the Union, or any of its drivers, had ever existed; that contract obligations were incurred with Hinkle and with no one else; that this was well known to the Union and to the driver; that the driver, Wolfe, had been advised that noontime deliveries of bread were extremely inconvenient and, accordingly, was asked to deliver the bread at some other hour; that the driver then refused to deliver bread at all; that respondent was indebted to Hinkle for bread already delivered "and in accordance with the said practice which had existed over the entire

period of time during which respondent had been buying bread from this bakery made her check payable to the owner of said bakery in the amount which she considered to be in full for all indebtedness then existing;" that Andre came to the delicatessen and stated that there was owing to the driver, Wolfe, approximately twelve dollars ($12.00) more than the amount forwarded to Hinkle by check; that by letter dated August 8, 1945, the check mailed to Hinkle was returned by Andre of the Union "because it is $12.22 short of the amount which is owed to our member, Leon Wolf." (R. 9)

Affiant further stated that no bread had ever been purchased from Wolfe and that all bread was ordered directly from the Hinkle Bakery.

Affiant further stated that prior to receiving the said letter, Andre orally advised affiant that the full amount would have to be paid and while doing so "pointed to a few packages of rolls" and advised him that he must get rid of them; that these rolls constituted but a small item of plaintiff's merchandise and, in comparison with the total amount purchased and sold by respondent, constituted an insignificant amount. The affiant further stated that as to this statement with regard to these rolls, Andre was making of them but an occasion for enforcing payment to Wolfe, the driver, a member of the Union.

Affiant then stated that Wagshal's had discontinued handling said rolls even though the same brand of rolls were on sale in many establishments in the City of Washington; further, that no question had ever been raised by the Union or any member (including Wolfe) thereof at any time theretofore in regard to their sale on the premises of respondent, even though the said Union had been delivering bread to Wagshal's from Hinkle's Bakery over a long period of time. (R. 10-11)

Affiant further stated that the Union caused all deliveries of bread to be stopped and threatened bakeries and

stores with reprisals if deliveries of any kind of merchandise were made to the respondent. (R. 11, 12)

Affiant concluded by stating that Wagshal's was willing and able to pay any indebtedness owing to the owner of Hinkle's Bakery; that at no time had there ever been a dispute with Hinkle; and "that the defendant Union is now attempting by its conduct hereinbefore described to compel the payment of a small item of $12.22 without determining the justice of the payment. . . ." (R. 12, 13)

Milton Blum

He stated that he was a partner and co-owner of the New Philadelphia Bakery located at 218-9th Street, Southeast; that commencing about July 7, 194., Wagshal ordered certain bakery products and deliveries were made; that payment therefor was made by check; that said deliveries averaged about 1,000 loaves of bread exclusive of rolls; that on July 25, 1945, Andre, agent of the Union, informed him that no further sales or deliveries of bakery products could be made to Wagshal for the reason that money was owed to a Union driver and that Wagshal refused to make payment. The affiant was told that unless sales to Wagshal were stopped, his bakery truck drivers would be "pulled out as the drivers refused to work for anyone who did not pay their bills." No further sales were made to Wagshal. (Unprinted Record, this Court)

Jacob C. Leaman

This affiant was employed by the Atlantic and Pacific Stores, located at 4855 Massachusetts Avenue, Northwest, adjacent to Wagshal's Delicatessen. He stated that an agent of the Union told him that no bread of any kind was to be sold to Wagshal and that even if as much as one loaf of bread was sold, no more bread would be delivered to said A. & P. Store. Accordingly, no further sales were made to Wagshal. (Unprinted record, this Court)

Leon Terish

This affiant stated that he operated a grocery store in Hyattsville, Maryland. He stated that he knew Benjamin Wagshal and, in order to assist him, had permitted purchases of bakery products to be made in his name; that an agent of the Union appeared at his store and told him that he was "not supposed to help Wagshal in any way to obtain bread, etc., from any of the bakeries and that we will have to watch you to make sure that you do not help Wagshal." (Unprinted record, this Court)

Benjamin Wagshal

This affiant filed a further supporting affidavit wherein he stated that every effort to secure bread was thwarted by the Union and that he was followed by an agent or agents of the Union in order to prevent him from obtaining bread and bakery products from any and all bakeries. (Unprinted record, this Court)

Bernard H. Patton

This affiant stated that he was the plant manager of Rice's Bakery. Although deliveries had been made over a long period of time to Wagshal, the driver for Rice's Bakery was directed by the Union to cease making deliveries to Wagshal "by reason of certain difficulties." The driver brought the bakery products back to Rice's. "Due to the said demand of said Union we have made no further deliveries to said store." (Unprinted record, this Court)

Leo H. Freiburger

This affiant stated that he was the owner of the Certified Bakery. He stated that he refused to sell or deliver bread to Wagshal for the reason that a Union official had informed him that Wagshal's Delicatessen was cut off from service by all Union bread salesmen because of a bill due and unpaid owing to one of the members of the said Union.

He also stated that selling bread to Wagshal at the bakery might be construed as a labor dispute and result in a work stoppage by the members of the Union at his bakery. "I therefore refused to sell the bread to Mr. Wagshal for the above mentioned reason. Furthermore, it is not the policy of this bakery to sell bread to anyone indebted to another bakery." (Unprinted record, this Court)

ARGUMENT

Point I.

The Cause Involves Nothing More or Less Than an Ordinary Debt Action Normally Justiciable in the Small Claims Court of the Municipal Court for the District of Columbia.

The only question before the Court is whether a controversy over the amount of an alleged debt constitutes a "labor dispute" within the meaning of the Norris-LaGuardia Act. Collaterally, there is involved the question as to whether the identity of the true creditor in a sale of merchandise can become the subject matter of a "labor dispute." A careful reading of the Record will disclose that any other controverted matters lurking in the pleadings and argument are just so much window dressing. No quarrel, controversy or dispute of any kind existed between the litigants until Andre maintained that Wagshal owed Wolfe, the truck driver, $12.22. When Wagshal refused to pay that sum, then boycotting, picketting, slander, libel, conspiracy, threats, reprisals and all that is considered the normal incidents of a true "labor dispute" followed . A cause normally the subject of a claim in the Small Claims Branch of the Municipal Court for the District of Columbia became according to the Union, a "labor dispute" and it was claimed the Court was without jurisdiction to stop any and all acts designed to compel Wagshal to pay the money to the truck driver. This, although

Wagshal had never had any contractual dealings whatsoever at any time with the Union or any member thereof.

Point II.

Analysis Shows the Mere Pretense of a Labor Dispute

Petitioners' brief is based on facts which do not appear in the pleadings either by direct averment or reasonable inference. In fact it proceeds upon presumption. Petitioners had the choice of filing an Answer to the Complaint and disclosing in that Answer the facts upon which they now rely by way of argument to make out a "labor dispute". They chose, however, to file a Motion to Dismiss. This Motion admits every fact well pleaded and every reasonable inference from the facts well pleaded. None of the ultimate facts in the Complaint spells out a "labor dispute" within the meanings of the Norris-LaGuardia Act. Petitioners' argument (Brief p. 8-10) amounts to the contention that every difference between labor and industry constitutes a "labor dispute". This is not and cannot be the law. If it were so then every specious or ill-tempered difference arising between a laborer and a businessman would constitute a "labor dispute" and give to the Union the right to exert all of its power, with no rights left in business to oppose it except in the circumstances covered by the LaGuardia Act (29 U. S. C. Sec. 107). Petitioners could have filed an Answer to the Motion for preliminary injunction, with affidavits, setting up therein those alleged facts which make out the "labor dispute" they try to read into the Complaint *now* in order to save the Motion to Dismiss. This they cannot do.

No court will hold that a mere dispute with a labor union is sufficient to oust the jurisdiction of a Federal District Court to grant an injunction where otherwise the facts warrant one and where no "labor dispute" within the meaning of the Norris-LaGuardia Act exists. In this case on the broadest theory conceivable the controversy

involved the amount of a bill owed to a third party (Hinkle) and its attempted collection.

Surely a dispute about an amount owed for bread to a third party cannot constitute a "labor dispute" where no relationship of employer and employee exists and where the purchase was made from the employer of the driver. As to Respondent the driver was acting in the capacity of a bill collector. The seller of the bread may have been glad to have him do so. He would thereby make it possible to obtain the amount he contends was due through the force of all the union activities. He cannot oust the Court of jurisdiction to determine the facts in controversy or deprive the purchaser of his right to his day in court. The driver who has volunteered cannot invoke the rights of union labor in his capacity as a volunteer bill collector. The relationship between the Bakery and the driver which is set forth in Petitioners' brief appears nowhere in the Complaint. Assuming it to be true, the driver then becomes an independent vendor and is within the ruling in *Columbia River Packers Ass'n v. Hinton*, 315 U. S. 143.

Neither is the dispute about the hour of delivery a "labor dispute". Respondent averred it as the occasion which caused the peevishness on the part of the driver. There is nothing in the record to show the Union picketed and boycotted because of the noon-hour dispute. There are six lines in the Complaint devoted to narrating this incident (R. 2) and not one word about it in the rest of the record. Petitioners' counsel might indulgently concede that Respondent's counsel, who are well aware of the existence of the LaGuardia Act, would not deliberately and unnecessarily plead an allegation capable of such a construction. A casual complaint about the inconvenience of deliveries at a particular time cannot be exaggerated into a dispute about hours, conditions of employment, wages, etc., which constitute the essentials of a "labor dispute" within the Norris-LaGuardia Act.

Petitioners then seize upon the allegation of "a certain non-union made item" (R. 2) identified in Wagshal's affidavits as rolls. (R. 10) But the same affidavit alleges the complaint about the rolls was but a pretext to enforce a threat relating to the bill. (R. 10) In any event Respondent promptly discontinued the item. (R. 10)

POINT III.

There Never Was a Dispute About Any Subject Other Than the Collection of a Bill.

A union truck driver tells a delicatessen owner that he cannot deliver bread at hours convenient to the delicatessen owner. The delicatessen owner, accordingly, is told by the bakery owner that the truck driver will no longer deliver any bread to the aforesaid delicatessen. (*There is no dispute or controversy of any kind at this point.*) (See at this point definitions of a "labor dispute", 29 U. S. C. 113 c) Shortly thereafter, a business agent of the Union called at the delicatessen and declared that the sum of $150.00 was owing to the truck driver and that this sum had to be paid immediately. The delicatessen disavowed any debt owing to the driver, saying the money was owed to the bakery owner, and this is when the *dispute begins.* The business agent said that payment must be had directly to the driver and, furthermore, the delicatessen was selling a "certain non-union made item" and unless this ceased (*and it did cease*), the delicatessen would be blocked from receiving bread, as well as all other food products, from all sources. The delicatessen owner, several days thereafter, sends a check to the bakery owner for a given amount in full settlement of the outstanding amount. Sometime shortly thereafter the labor union, of which the bakery truck driver is a member, returned the check by letter to the delicatessen owner, saying that the check is $12.12 less than what the bakery truck driver maintains the correct amount to be and that the money is owed to the bakery truck driver and not to the bakery owner.

The problem now is whether (a) the matter of who is entitled to the money, i. e., the bakery owner or the bakery truck driver constitutes a "labor dispute" and (b) whether the mechanics of collecting the debt per se constitute a "labor dispute."

Up to the time that the dispute arose as to who was the creditor, there had been no controversy as to any product, but the Union, by way of lifting itself by its own boot straps and to justify the "collection of a debt" (?) and wreckage of a business, and the invoking of sanctions which it conceived to be proper, proceeded to seize on this makeweight. Is that a "labor dispute"?

The question now becomes whether, at this stage, a "labor dispute" existed. Collaterally, this gives rise to the question as to whether or not a "labor dispute" must be a *good faith* labor dispute. We maintain that when the Union's agent pointed to the non-union product he did so in bad faith as alleged in the Complaint (R. 2) and admitted by the Motion to Dismiss, and that *at no time* did the question as to whether the delicatessen owner was carrying a non-union product ever constitute the subject matter of any controversy between the parties.

Petitioners now hope to cut off a full hearing on the merits. By filing a Motion to Dismiss and by proffering what might or could have been shown below (Petitioners' brief p. 8-9) they hoped to avoid a trial where these matters can be determined. If a labor union can by its own fiat label any fact situation wherein the Union is involved a "labor dispute" and then by the technique of a Motion to Dismiss avoid a hearing, a procedure will have been approved which hardly comports with due process. If this labor union bona fidely maintains that this case involves a "labor dispute", it should have no hesitancy in bringing the proof out in the open.

POINT IV.

The Complaint as Filed by the Plaintiff and Construed by the Court Below Did Not Disclose a "Labor Dispute."

We maintain the District Court had jurisdiction and power to order a temporary injunction *upon the Complaint as filed,* supported by the affidavits. Our Complaint proceeded upon the theory that there was no valid "labor dispute"; it was drafted to show upon its face that there was no such dispute.

The District Court possesses general jurisdiction to award injunctions. If any limitation upon that jurisdiction exists, it must be found in the Norris-LaGuardia Act. The Norris-LaGuardia Act deprives the District Court of jurisdiction to award injunctions in "labor disputes" unless in accordance with the terms of that Act. Therefore, if no labor dispute is disclosed upon the face of this Complaint, then the Norris-LaGuardia Act does not apply. Does the District Court not have jurisdiction, therefore, at least initially to examine and analyze the allegation of the Complaint to determine whether or not it discloses upon its face the existence of a valid "labor dispute"? Assuredly it has that jurisdiction. (Compare *United States of America v. United Mine Workers,* 91 L. Ed. 595, 613. If, therefore, the Court determines that no valid "labor dispute" exists, after analyzing the Complaint, then why does the Court still not retain jurisdiction to order an injunction? The District of Columbia Code gives the Court the power specifically to issue this injunction. The Complaint complied with the Rules of Court in the manner of its drafting. If there is no "labor dispute" shown, the Complaint is substantially sufficient and the Court had the jurisdiction to issue the order which it issued.

Petitioners argue that the Norris-LaGuardia Act is so broad both in its language and intent that the Court is deprived of all jurisdiction to issue injunctions against

labor unions once the petition discloses even by a prayer for relief that an injunction is sought; that from that point the Court must compel compliance with the Norris-LaGuardia Act. With this contention we disagree. We maintain what has been said heretofore, that no Court can read into the language or intent of the Norris-LaGuardia Act the broad purpose of Congress to strike from the jurisdiction of the District Court all right to issue injunctions for any reason against a labor union.

If we are sound in this, then this Court must determine whether the refusal upon the part of Wagshal to meet the demands of the Union driver to pay the bill to Hinkle in the full amount which he demanded constitutes a valid "labor dispute". As to this the Complaint discloses that Wagshal was in contractual relations with the Bakery Driver or Union at no time; that for several years Wagshal had been buying bread from Hinkle and paying Hinkle and that the relationship of vendor and vendee existed between these two; that the Union and the Bakery driver were strangers to that relationship; and that neither Hinkle nor the bakery driver could bring to bear upon Wagshal the full force of the strength of the Labor Union, with all the rights accorded to labor to enforce their demands, as a collection agency. If Hinkle asked the Union to collect the bill then the Union stepped aside from its character as a labor union and became a mere volunteer as said collection agency to aid Hinkle in obtaining his demands rather than have the claim determined by due process of law in the courts. If the Union contends that it was in contractual relations with Wagshal because of a side contract (of which we have no knowledge) between the Union and Hinkle to the effect that all moneys for bread sold on the route of the driver belonged to the driver and all liabilities therefor became the obligation of the driver, then the Union again stepped out of its character as a Union and becomes the vendor of the bread with the responsibility to make collections in accordance with law

for amounts owed for the sale thereof just as any other vendor or citizen. It cannot utilize those powers which the law has given the Union to enforce its demands for better wages and working conditions when in truth and in fact it is merely acting to collect a bill.

The Court must further decide whether the broad, general allegation of an objection to a certain non-union made item on the shelves of Wagshal constitutes the basis for a valid "labor dispute". This case was heard on a Motion to Dismiss. As said heretofore all the allegations of the Complaint are taken as true. In reply to the Motion to Dismiss and in support of the Motion for preliminary injunction, affidavits were submitted. Appellants now contend (Petitioners' brief p. 10, footnote) that the Court cannot refer to affidavits in the determination of the Motion because the Norris-LaGuardia Act specifically prohibits that reference. To determine the unity of the non-union made item it is necessary to refer to the affidavit of Benjamin Wagshal and if such reference is made, then the Court had the right to consider all of the affidavit. The transcript of the argument in the District Court will show that *Counsel for Petitioners* first imported the contents of the affidavits into the argument in the Court below. Therein it appears the item had been discontinued; (R. 10) that the dispute was mooted; (R. 10) that no legal ground existed further for the continuance of the conduct of the Union because of the item. Counsel must stand, therefore, or fall upon the affidavit if he refers to it at all. Here, again, there was no counter-affidavit filed denying the facts set forth in the affidavit. All Wagshal's affidavit did was to take out of the case a matter no longer pertinent. It was equivalent to amending the Complaint in the respect covered. There was no proffer by Petitioners of a traverse of Wagshal's oath that he had ceased dealing in the non-union goods.

POINT V.

There was No Need for Findings of Fact, the Pleadings Being Uncontroverted.

Petitioners in their Brief (p. 4, 7) speak of the failure of the Court below to make findings of fact. They rely on the Norris-LaGuardia Act (Sec. 9) but obviously the Norris-LaGuardia Act would not control unless a "labor dispute" existed. We say that this was a normal non-jury case wherein Rule 52 of the Federal Rules of Civil Procedure controlled if the facts were controverted. No evidence was taken. No Answer was filed. No counter-affidavits were filed. What facts could the Court find? All the facts were admitted by Petitioners. Certainly the Court was not required to pick and choose from ultimate and basic fact allegations in uncontroverted pleadings and affidavits. The only thing the Court below had to do was determine whether a "labor dispute" existed on the uncontroverted record. It found that none existed. That was the end of it.

POINT VI.

The Distinction Between No Labor Dispute at all and a Labor Dispute Without Merit.

Petitioners distort the Opinion below into holding that there was a labor dispute but it had no merit. (Petitioners' Brief, p. 12) They then proceed to slay this dragon with cases like *U. S. v. Hutcheson*, 312 U. S. 219; *Milk Wagon Drivers Union v. Lake Valley Farm Products*, 311 U. S. 91 and other cases (Petitioners' Brief p. 13-15) holding that Courts are not concerned with the morals of a labor dispute if in fact there is a dispute. But that is the whole point of the Opinion below. It did not hold there was a labor dispute without merit. The Court held there was no dispute in fact, but the mere show or pretense of a dispute. As the Court below said:

"The Courts have been most liberal in holding that wherever the facts show a bona fide labor controversy, *founded upon genuine issues involving the protection of labor in pursuing its legitimate objectives*, the Norris-LaGuardia Act is an effective bar to injunctive relief * * *. It does not follow from this that, where the facts do not support the assertion that there is in *fact* a dispute, the union should have the benefit of the doubt * * *" (R. 20, italics supplied)

What is this but saying that a Union agent's vindictive reprisal for failure to collect a $12.22 debt is not a *bona fide* labor dispute, i. e., not a labor dispute at all. Counsel for Petitioners are apt to forget that the phrase "labor dispute" means "labor dispute" as defined in the Norris-LaGuardia Act, Sec. 13 (29 U. S. C. A., Sec. 113). As the Court below said:

"To maintain that such gratuitous interference on the part of defendant Andre constitutes a "labor dispute" within the careful definitions of the Norris-LaGuardia Act is ridiculous." (R. 21)

This is not to descend into a discussion of the rights and wrongs of the alleged dispute, as Justice Edgerton's dissent states (R. 23). It is simply to hold that the Court will not permit a fraud on its jurisdiction; will not permit the pretense of a dispute, outside the Act, to be palmed off on it as within the Act.

The determination of the Court below that the Norris-LaGuardia Act did not apply and that it had jurisdiction to grant the Injunction was the ordinary intial determination of its jurisdiction by a Federal Court. It is analogous to a Federal Court determining, initially, that it had jurisdiction upon the claim of the existence of a Federal question or on diversity of citizenship or on removal. The Court's initial assumption of jurisdiction in such cases is always subject to change if in the trial of the case the facts show that no jurisdiction exists. In the case of *Domestic and Foreign Commerce Corporation v. Littlejohn* (unreported), decided by the United States Court of Ap-

peals for the District of Columbia, December 8, 1947, the Court adverted to this rule of practice in sustaining a suit against the War Assets Administrator, overruling a contention that it was a suit against the United States. The Court quoted with approval the following from *Franklin Tp. v. Tugwell*, 66 App. D. C. 42, 63; 85 F. 2d 208, 229:

> "Since a court must determine at the outset its jurisdiction to proceed, it is compelled to make a preliminary decision for jurisdictional purposes on the ultimate question in the suit, and this notwithstanding the fact that when the merits are heard, it may be compelled to reach an opposite conclusion. The courts solve this problem by accepting at their face value, for jurisdictional purposes, the assertions of the complainant of want of power in the officers—unless such assertions are 'so unsubstantial and frivolous as to afford no basis for jurisdiction. . . .', (citing Northern Pac. Ry. Co. v. North Dakota, 250 U. S. 135, 39 S. Ct. 502, 63 L. Ed. 897) and by giving the assertions thus accepted their natural jurisdictional consequences in respect of who are necessary parties."

Similarly in the present case the trial Court had power for purposes of a temporary injunction, and in the absence of a traverse by petitioners, to take the facts of the Complaint as alleged. If those facts showed no "labor dispute" was involved, the Court naturally had power to grant the injunction. The affidavits considered by the Court simply supported the allegations of the Complaint and there was no violation of the LaGuardia Act in their use. The action of the trial Court in the present case is very similar to that of the same Court (and the same Judge) in *United States v. United Mine Workers*, 91 L. Ed. 595, 613, 624, wherein this Court sustained the action of the trial Court in granting a temporary restraining Order to preserve the status quo. As said in the concurring opinion of Mr. Justice Frankfurter:

> "In the case before us, the District Court had power 'to preserve the existing conditions' in the discharge

> of 'its duty to permit argument and to take the time required for such consideration as it might need' to decide whether the controversy involved a labor dispute to which the Norris-LaGuardia Act applied." (91 L. Ed. 595, 624 at page 624)

In the present case the trial Court likewise granted a temporary injunction to preserve respondent's position in the expectation that the case would come on for early trial on the merits, a hope that was defeated by petitioners' action in pursuing successive appeals based on technical legal grounds. It comes with very poor grace from petitioners that they complain of the Court granting the temporary injunction on the Complaint and affidavits without hearing witnesses (Petitioners' brief, page 12), when petitioners deliberately refused to adopt a course (by traverse or counter-affidavits) which would have resulted in hearing witnesses.

CONCLUSION

The writ should be dismissed on the ground of mootness. If not, the judgment below should be affirmed.

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EXHIBIT A

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1947

No. 225

BAKERY SALES DRIVERS LOCAL UNION No. 33,
An Unincorporated Association, and
CHARLES M. ANDRE, *Petitioners*,

v.

A. WAGSHAL, Trading as "Wagshal's Delicatessen",
Respondent.

AFFIDAVIT OF BENJAMIN WAGSHAL

DISTRICT OF COLUMBIA, SS:

Benjamin Wagshal, being first duly sworn, deposes and says that he is the Manager of A. Wagshal, trading as Wagshal's Delicatessen, and has been for approximately eleven years.

The said Benjamin Wagshal, affiant herein, for further details and particulars as to his connection with the Delicatessen aforesaid and, more particularly, the dispute herein, respectfully refers this Honorable Court to the Affidavit which he filed in the United States District Court for the District of Columbia. (R. 8-13)

Affiant says that from the time the Preliminary Injunction was issued by the United States District Court on September 7, 1945, (R. 13-14) until the Decision in the

United States Court of Appeals for the District of Columbia on April 28, 1947, your affiant alone, and on occasions with a subordinate employee, secured necessary bread and kindred pastry products from various Union establishments in the District of Columbia. Your affiant was, however, required to provide his own transportation in procuring the said bakery products and, more particularly, was required to pick up the said bakery products at the bakery shops with his own automobile. Members of the Petitioners' Union herein, Bakery Sales Drivers Local No. 33, refused to deliver the said bakery products thus necessitating your affiant providing the transportation incident to securing the bakery products customarily used in the conduct of the businsss of the Respondent herein.

Your affiant further says, however, that on or about one week after the Decision of the United States Court of Appeals affirming the District Court, about May 10, 1947, a letter of instruction, signed by Charles M. Andre, Petitioner herein, was issued by the Bakery Sales Drivers Local Union, No. 33, Petitioner herein, addressed to the members of the aforesaid Labor Union, the same being the drivers of the bakery trucks delivering bread and bakery products from bakeries located in the District of Columbia having collective bargaining agreements with the aforesaid Local Union, stating that the said bakery drivers were now allowed to deliver bread and bakery products to Wargshal's Delicatessen, 4855 Massachusetts Avenue, N. W., Respondent herein.

Immediately upon the posting of the aforesaid letter of instruction by the Petitioner-Union, the drivers from many local bakeries called upon the store of the Respondent herein and offered their products for sale and delivery. Included among the drivers were those from the New Philadelphia Baking Company, Crusty Pie Company, Certified Bakery of the Continental Bakery Company, New Yorker Bakery Company, Ottenberg's Bakery, Bond Bak-

ing Company and other bakeries, the same all being bakery establishments employing Union bakery truck drivers exclusively. Your affiant at that time made purchases from New Yorker Bakery and Certified Bakery of the Continental Bakery Company and Crusty Pie Company and immediately thereafter began purchasing bread again from the New Philadelphia Baking Company. Currently, your affiant purchases from Crusty Pie Company, New Philadelphia Baking Company and Certified Bakery of the Continental Bakery Company. Deliveries have been made by the drivers of the aforesaid bakery establishments without interruption, peacefully and without dispute of any kind, from approximately May 10, 1947 to the time of these presents. At the present time the said deliveries are being made and there is no dispute whatsoever with the Union drivers of any of the bakery establishments aforesaid and from whom the Respondent herein makes purchases. Hinkle's Bakery went out of business April 15, 1946, and later reopened as a retailer only. The New Philadelphia Bakery is paid by check; the Continental Bakery is paid by paying the driver.

BENJAMIN WAGSHAL.

Subscribed and sworn to before me this 10th day of December, 1947.

EMILY V. MCKENZIE
Notary Public D. C.

R. 7.

SUPREME COURT OF THE UNITED STATES

No. 225.—October Term, 1947.

Bakery Sales Drivers Local Union No. 33, an Unincorporated Association, et al., Petitioners, v. A. Wagshal, trading as "Wagshal's Delicatessen."	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[March 15, 1948.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This is an action brought in a United States District Court to enjoin interference with a business, and the question is whether the complaint subjects that court to the limitations imposed by the Norris-LaGuardia Act upon its equity jurisdiction.

This is the substance of the complaint. Respondent owns a delicatessen store which sells food and serves meals. She obtained bread for the delicatessen store from Hinkle's bakery. Deliveries were made by a driver, an employee of Hinkle and a member of Local Union No. 33, one of the petitioners. The driver delivered the bread at noon, which inconvenienced the respondent, since the checking of deliveries at that hour interfered with the serving of lunches. Respondent "required" the driver to bring the bread at another hour. Shortly thereafter, Hinkle informed the respondent that it would no longer furnish her with bakery products. And so, respondent made arrangements with another bakery, which delivered at a more convenient hour.

Three weeks later, the petitioner Andre, president of the union, visited the delicatessen store and stated that the respondent owed the driver approximately $150 and

requested immediate payment. Respondent replied that she had never had dealings with the driver, but had paid Hinkle directly by check, and would pay the bill in due course. Andre replied that the payment would have to be made to the driver in full; furthermore, that if the respondent did not cease carrying a certain non-union article of food he noticed on display, delivery of bread, milk, and other products necessary to the respondent's business would be cut off. Shortly thereafter the respondent sent a check to Hinkle for the balance of her bill. It was returned by the union, with a letter signed by Andre asserting that the payment was owed to its member, the driver, and could not be accepted. The following day, the bakery which had been serving respondent after Hinkle had stopped doing so, ceased to deal with her, explaining that the union had threatened otherwise "to pull out all its drivers." Through an effective boycott, the union kept the respondent from obtaining bread from other bakeries or retail stores. The delicatessen store was also picketed.

The complaint prayed for temporary and permanent injunctions against the boycott and other interference with respondent's business, the payment of damages, and the usual catch-all relief. Petitioners moved to dismiss the action on the ground that the controversy as set forth in the complaint involved a "labor dispute" under the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. §§ 101 *et seq.* Respondent filed an "answer to motion to dismiss," attached to which were affidavits, including one of Benjamin Wagshal, manager of the delicatessen store, elaborating the incidents narrated in the complaint. Among other matters set forth, he stated that payment for bread purchased from Hinkle had always been made by check sent directly to Hinkle and was never made to a driver, and that neither the union nor any of its drivers had ever previously questioned this practice; that Andre

had asserted by mail and at the delicatessen store that the check which the respondent had sent to Hinkle was $12.22 short of the amount owed; and that the non-union item on sale to which Andre had objected was not a subject of controversy but merely an excuse for Andre's attempt, on his visit to the delicatessen store, to enforce his demands concerning the bill, and that in any event its sale had been discontinued.

The District Court granted an injunction *pendente lite*, restraining the petitioners from interfering with respondent's business or preventing sale and delivery of bakery products to the respondent, by boycott and picketing. At the same time, it denied the petitioners' motion to dismiss. Petitioners filed a notice of appeal to the Court of Appeals for the District of Columbia, and respondents moved to dismiss the appeal.

If this case does not involve a "labor dispute" under the Norris-LaGuardia Act, an appeal as of right could not be had in the Court of Appeals for the District of Columbia. 31 Stat. 1189, 1225, as amended, D. C. Code (1940) § 17–101. However, § 10 of the Norris-LaGuardia Act, 47 Stat. 70, 72, 29 U. S. C. § 110, provides for immediate review of an order granting or denying "any temporary injunction in a case involving or growing out of a labor dispute . . . ."[1] The Court of Ap-

[1] Section 13 of the Norris-LaGuardia Act, 47 Stat. 70, 73, 29 U. S. C. § 113, reads as follows:

"Section 13. When used in this Act, and for the purposes of this Act—(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more

peals, one justice dissenting, held that this was not such a case, and dismissed the appeal. 161 F. 2d 380. Because of asserted conflict between this decision and prior decisions of this Court on the scope of "labor dispute" within the meaning of the Norris-LaGuardia Act, we granted certiorari. 332 U. S. —.

A preliminary claim must be met, that the case has become moot. The short answer to the argument that the Labor Management Relations Act of 1947, P. L. 101, 80th Cong., 1st Sess., § 10 (h), has removed the limitations of the Norris-LaGuardia Act upon the power to issue injunctions against what are known as secondary boycotts, is that the law has been changed only where an injunction is sought by the National Labor Relations Board, not where proceedings are instituted by a private

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employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as hereinafter defined) of 'persons participating or interested' therein (as hereinafter defined).

"(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association, or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment; regardless of whether or not the disputants stand in the proximate relation of employer and employee.

"(d) The term 'court of the United States' means any court of the United States whose jurisdiction may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia."

party. The claim of mootness is also based on an affidavit stating that after dismissal of the appeal by the Court of Appeals, the union lifted its boycott. Since the record does not show that a stay of the injunction was granted pending action in this Court, we must assume that the union's action was merely obedience to the judgment now here for review. We therefore turn to the merits.

The petitioners attach significance to three incidents for their claim that a "labor dispute" is here involved.

1. The controversy over the hour of delivery. The petitioners claim that this was a dispute "concerning terms or conditions of [the driver's] employment," thereby raising a labor dispute, "whether or not the disputants stand in the proximate relation of employer and employee." § 13 (c) of the Norris-LaGuardia Act. But the respondent had nothing to do with the working conditions of Hinkle's employees, individually or collectively. Her only desire was to have the bread come at an hour suitable for her business, and she had no interest in what arrangements Hinkle made to satisfy that desire rather than run the risk of losing her trade—to have the bread delivered by the same driver at a different hour, or by another driver, by an independent contractor, or through some other resourceful contrivance. To hold that under such circumstances a failure of two businessmen to come to terms created a labor dispute merely because what one of them sought might have affected the work of a particular employee of the other, would be to turn almost every controversy between sellers and buyers over price, quantity, quality, delivery, payment, credit, or any other business transaction into a "labor dispute." Cf. *Columbia River Packers Assn.* v. *Hinton*, 315 U. S. 143. Furthermore, on the basis of what we have before us, respondent's disagreement with Hinkle over the delivery hour was a dead controversy, not in-

volved in the subsequent dispute with the union, or in the boycott against which the injunction was directed.

2. The controversy over the bill. The petitioners regard both the question whether payment was to be made to the driver rather than to Hinkle, and the disagreement over the disputed sum of $12.22, as a matter concerning the driver's wages, and therefore a condition of his employment. But, on the allegations now here, respondent had nothing to do with the payment of the driver's wages. The delicatessen store was Hinkle's customer. On the basis of the allegations to be considered, the driver would receive his pay whether or not respondent paid her bill. It is immaterial that the driver may have been the conduit for payment—as drivers who deliver packages normally are. The same is true as to the disputed item of $12.22. The mere fact that it is a labor union representative rather than a bill collector who, with or without the creditor's consent, seeks to obtain payment of an obligation, does not transmute a business controversy into a Norris-LaGuardia "labor dispute." Cf. *Dorchy* v. *Kansas*, 272 U. S. 306, 311.

3. The non-union item on sale in the delicatessen store. Sale by a merchant of non-union commodities is, no doubt, a traditional source of labor disputes within the scope of the Norris-LaGuardia Act. While the complaint itself did not indicate the history of this matter after Andre's visit, the affidavit attached to the "answer to the motion to dismiss" sets forth that it was not a bona fide bone of contention, but a mere pretext, and, further, that the respondent thereafter withdrew the item from sale. While the conclusion of the incident giving rise to a controversy may not necessarily terminate a labor dispute (cf. *Hunt* v. *Crumboch*, 325 U. S. 821), what is before us leaves no doubt that the subsequent boycott was addressed only to the question of payment of the bill. Petitioners suggest that since no injunction may issue in a case grow-

ing out of a labor dispute, except upon oral testimony, determination whether there is a labor dispute should not rest on affidavits. But in this case the affidavits were merely a gloss on the complaint and as such constituted an informal amendment. They serve here as allegations, not proof.

This case was decided on a motion to dismiss. All that was determined was that on the basis of the respondent's claims, which the petitioners chose not to controvert, the Norris-LaGuardia Act did not apply. Since the only issue before the court below, and therefore before us, was the appealability of the order for an injunction *pendente lite*, which in turn depended on the applicability of the Norris-LaGuardia Act, questions ~~on the merits~~ are not now open here.

Affirmed.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE MURPHY dissent. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this case.